No. 85-370

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

BRIAN P. HEPLER,

Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

Duane E. Schofield
N 206 Sullivan
Veradale, WA 99037
(509) 922-0371

Counsel for Petitioner

August 14, 1985

Questions Presented

1. Is the State Appellate Court Decision reversing the Trial Court in part as to federal pre-emption of State law in conflict with the recent decision of the United States Supreme Court in **Metropolitan Life Ins. Co. v. Massachusetts,** 471 U.S. , 85 L.ed.2d 2d 728, 105 S.Ct. (June 3, 1985)?
2. Are state insurance and consumer protection statutes relating to written disclosure of insurance modifications saved from the pre-emption provision of § 514(a) of ERISA (29 U.S.C. § 1144(a)) by § 514(b)(2) of ERISA (29 U.S.C. § 1144(b)(2)) as law "which regulates insurance"?
3. Were the standards for liability utilized by the State Trial Court compatible with the ERISA arbitrary and capricious standard?
4. Can a Washington court apply the "most significant contacts" test for resolving a conflict of law issue, where the parties to the transaction otherwise designated their forum in a "choice of law" provision in the primary contract governing their rendition of services?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

BRIAN P. HEPLER,

Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

The Petitioner, **BRIAN P. HEPLER,** respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals, Division III, of the State of Washington entered in this proceeding on February 26, 1985, review denied by the Supreme Court of the State of Washington on June 7, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Washington, reported at 39 Wn.App. 838, 696 P.2d 596, appears as Appendix "A". That Court's order amending opinion appears as Appendix "B". That Court's order denying petitioner's motion for reconsideration appears as Appendix "C". The order of the Supreme Court of the State of Washington denying petitioner's application for review, reported at 103 Wn.2d 1041, appears as Appendix "D".

JURISDICTION

The order of the Supreme Court of the State of Washington denying review was entered on June 7, 1985. The Mandate of the Court of Appeals of the State of Washington reflecting that the opinion of the Court became the decision terminating review on June 14, 1985, appears as Appendix "E" and this Petition for Certiorari will have been filed within ninety days of June 7, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Article 6, Clause 2, provides in relevant parts:

United States Constitution Article 4, § 1, provides:

Full Faith and Credit Among States

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

United States Constitution Article 4, § 2, provides:

Privileges and Immunities

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

United States Constitution Article 6, Clause 2, provides in relevant parts:

Supremacy

(cl.2) This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

United States Constitution Amendment 10, provides:

Reserved Powers to States

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Constitution Amendment 14, § 1, provides:

Citizenship Rights Not to Be Abridged By States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Washington Constitution Article 1, § 2, provides:

Supremacy

The Constitution of the United States is the supreme law of the land.

Washington Constitution Article 1, § 3, provides:

Personal Rights

No person shall be deprived of life, liberty, or property, without due process of law.

Washington Constitution Article 1, § 12 provides:

Special Privileges and Immunities Prohibited

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

FEDERAL STATUTES INVOLVED

15 U.S.C. Section 1012(a) provides:

Regulation by State law

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.

(Mar. 9, 1945, c. 20, § 2, 59 Stat. 34; July 25, 1947, c. 326, 61 Stat. 448.)

29 U.S.C. Section 1022(a)(1) provides:

Plan Description and Summary Plan Description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as

provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(Pub.L. 93-406, Title I, § 102, 88 Stat. 841.)

29 U.S.C. § 1144(b)(2)(A), and (d) provide, in relevant parts:

Other Laws, Construction and Application

(2)(A) Except as provided in subparagraph (B) (referring to the Plan or Trust Fund itself), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

* * *

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in section 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

(Pub.L. 93-406, Title I, § 514, 88 Stat. 897).

STATE STATUTES INVOLVED

Unfair Business Practices--Consumer Protection, RCW 19.86.020, provides:

Unfair Competition, Practices, Declared Unlawful

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. (1961 c. 216 § 2).

RCW 19.86.090, provides in relevant part:

Civil Action for Damages--Treble Damages Authorized

Any person who is injured in his business or property by violation of RCW 19.86.020. . . may bring a civil action in the Superior Court to enjoin further violations, to recover the actual damages sustained by him, or both, together with costs of the suit, including a reasonable attorney's fee. and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained: **Provided,** that such increased damage award for violation of RCW 19.86.020 may not exceed $10,000:. . .

(1983 c. 288 § 3, 1970 ex.s. c. 26 § 12, 1961 c. 216 § 9)

RCW 19.86.920, provides:

Purpose--Interpretation--Liberal Construction--Saving

The legislature hereby declares the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters and that in

deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the State of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.

It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest. [1983 c. 288 § 4; 1983 c. 3 § 25; 1961 c. 216 § 20.]

Washington Trustee's Accounting Act, RCW 30.30.020, provides:

Trustee's Annual Statement

The trustee or trustees appointed by any will, deed or agreement heretofore or hereafter executed shall mail or deliver at least annually to each adult income trust beneficiary a written itemized statement of all current receipts and disbursements made by the trustee of the funds of the trust both principal and income. . .

(Enacted Laws 1955 c. 33 § 30.30.020 p. 213)

Washington Insurance Code, RCW 48.01.020, provides:

Scope of Code

All insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith are governed by this code.

(Enacted Law 1947 c. 79 § .01, .02 p. 189)

RCW 48.01.030, provides:

Public Interest

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, and their representatives rests the duty of preserving inviolate the integrity of insurance.

(Enacted Laws 1947 c. 79 § .01, .03 p. 189)

RCW 48.01.060, provides:

"Insurance Transaction" Defined

"Insurance transaction" includes any:

(1) Solicitation.
(2) Negotiations preliminary to execution.
(3) Execution of an insurance contract.
(4) Transaction of matters subsequent to execution of the contract and arising out of it.
(5) Insuring.

(Enacted Laws 1947 c. 79 § .01, .06 p. 190)

RCW 48.18.190, provides:

Policy Must Contain Entire Contract

No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy.

(Enacted Laws 1947 c. 79 § .18, .19 p 366)

STATEMENT OF CASE

Nature of the Proceedings Below: This Petition for Review arises out of a state action by an employee against his employer for loss of income continuation benefits under an employee welfare plan caused by the employer's wrongful conduct in artificially computing and paying his required disability plan contributions. (CP 1 - 14, 19 - 28, 100) The out-of-state employer appeared and accepted service of process on November 4, 1982, and answered the allegations asserting that it had deducted the plan contributions using an artificial salary rather than the employee's commission income as a practice for roughly 3,000 of its 18,000 employees, and that plan benefits were payable accordingly. (CP 29 - 31) No federal preemption issue was raised by the pleadings or during the trial which concluded with the employer objecting to the introduction of evidence of federal ERISA law requirements of written disclosure of cost or benefit amount modification. (RP 220)

On June 22, 1983, by revised opinion the Court determined that the employee was entitled to judgment against the employer for loss of disability benefits in the sum of $34,187.04 (RP 236) and prejudgment interest claimed due of $4,273.38 (RP 87, Ex. 17) and treble damages to the total of $1,000 and costs, including reasonable attorney's fees (RP 237), after considering the written disclosure requirements of state and federal law to be consistent (RP 232 - 234) and finding the employer to have violated said laws and resulting fiduciary and contract obligations by negligent misrepresentation and unfair and deceptive actions in violation of the Consumer Protection Act.

On August 10, 1983, the trial court made and entered its Findings of Fact pursuant to the above opinion, specifically XIX that it was a court of competent jurisdiction (CP 86) and XXII for the above damages and treble damages to the total statutory limit under the laws of the State of Washington, RCW 19.86.090, and any amendments thereto (CP 87). Both parties moved the trial court to reconsider, the employer contending that it could be found liable for a breach of contract but should not be held to the penalty of a Washington Consumer Protection Act violation (CP 149, First Supp.) and the employee contending that the fiduciary fraud warranted a jury trial on punitive damages by application of Pennsylvania law, or that treble damages without statutory limit should be applied by application of Pennsylvania law, or alternatively, that treble damages to the 1983 Washington amendment of $10,000 should be applied, attaching copies of the recent legislative amendments effective to judgments entered after July 24, 1983, RCW 19.86.090 & .920, to his supporting memorandum (FS CP 101 - 121, 134 - 135, 138 - 143, 150 - 155, & 160 - 174). The trial court denied both parties' motions for reconsideration.

For the first time on appeal, appellant's principal brief at pp.5 raised the issue of preemption of state law by federal substantive law standards of "arbitrary and capricious" as an ERISA administrator with discretion to decide questions of benefit eligibility, after consciously and intentionally resisting evidence, issues and theories of federal ERISA standards at the trial below (RP 220) (CP 115-116FS) and only after the adverse ruling below. Preemption was argued against in respondent's principal brief at pp. 5 - 6, & 16, and reply

brief at pp. 2 & 8, and objected to during oral argument before the Court of Appeals based upon 14th Amendment due process grounds. Issues of right to jury trial on punitive damages and increased treble damages were subject of assignment of error numbers 1, 2 and 5, and issue specification number 1, of respondent's principal brief, and re-statement of the case at pp. 5 - 8 thereof, and argued at pp. 12 - 22 thereof.

Nature of the Record: After the day and one-half trial, involving only 5 witnesses and 15 admitted exhibits, by a 6 page revised memorandum opinion (CP 69-75) the trial court concluded that disability insurance benefits are required by federal law, 29 U.S.C. § 1022(a)(1), and state law of general application (RP 232) to be clearly specified in the written documents governing the transaction and that the employer's alleged adjustment was in no manner contained in the controlling documents and was an illegal attempt to modify the benefit contract, violating both state law (RP 233) and federal law (RP 234) and being unfair and deceptive and in violation of the fiduciary obligations owed to the employee and in violation of the Consumer Protection Act (RP 235-235).

The primary exhibits at trial were as follows:

1. The employment agreement defining the employee's pay, payroll deductions, multi-state territory and eligibility (Ex. 1);

2. The payroll authorization obligating the employer to make deductions of the required costs of participation (Ex. 2);

3. The disability plan booklet summary explanation of eligibility, benefit adjustment for rehabilitative employment

and required costs of participation (Ex. 3);

4. The full plan text defining basic monthly earnings, monthly disability allowance, the plan administrator, other monthly income benefits and administrative powers and duties (Ex. 7).

On August 10, 1983, the trial court entered Findings of Facts and Conclusions of Law, and Judgment against the employer for the employee's damages and treble damages (CP 78-89) and on August 24, 1983, was entered the Judgment for costs and fees (CP 90). Thereafter, a 283 page verbatim report of proceedings was ordered out.

Statement of Facts: In March 1980, W.B. Saunders Company, a Pennsylvania publishing division of CBS, placed an advertisement in Salt Lake City and Spokane newspapers to hire commissioned sales representatives for its Northwest territory, composed of Utah, Idaho, and parts of Washington, Oregon, Nevada and Montana. Mr. Hepler responded, was interviewed and was subsequently hired by written employment agreement dated and forwarded from the company's Philadelphia, Pennsylvania home office on April 14, 1980. (Ex.1)

The employment agreement made Mr. Hepler eligible to participate upon beginning active work in an employee long term disability plan, designed to provide continuing income to the employee and his family in event of disability, as a company fringe benefit. This disability insurance program, hereinafter called the "Plan", was to provide monthly disability allowances in combination with any other family monthly disability income that would continue 75% of the employee's compensation earned prior to becoming disabled.

The employment agreement specified that the employee was to be paid regularly on a straight commission basis subject to certain deductions at the Pennsylvania office for a percentage of commissions as a reserve fund, FICA, federal withholding and other applicable deductions.

After returning the signed copy of the employment agreement to the Pennsylvania office, the employee was sent a Plan enrollment form (Ex. 2), which the employee signed and returned to the home office on May 16, 1980, authorizing the employer to deduct from his pay the required contribution toward the premium for the Plan participation. At the same time the employee began active sales work.

The primary document controlling the employment relationship provided for the "home" state[1] (RP 205):

> "This Agreement and all matters or issues collateral thereto shall be governed by the laws of the State of Pennsylvania applicable to contracts performed entirely therein.
>
> . . . .
>
> . . . This Agreement contained the entire understanding of the parties hereto relating to the subject matter herein contained, and **this Agreement cannot be changed or terminated orally.**" (Emphasis added.) (Ex. 1)

[1]The remaining documents involved were silent as to any change of the parties' choice of law, and merely specified where the state court process could be served: as to the employer, the Plan Administrator or the Trustee (Ex. 3). The Plan description (Ex. 7), designated one Joan Showalter, V-P Personnel, as the Plan Administrator whose powers included cost and benefit calculations.

The parties' contract provided for standard payroll deductions using actual commission pay earned. The plan payroll deduction authorization extended this practice for deducting Plan premiums at the rate of .75% of actual weekly earnings. Mr. Hepler discovered after becoming disabled and being determined eligible for disability benefits that the employer had wrongfully deducted .75% of an artificial salary of $200.00 per week, or $866.67 per month, and that the Plan Administrator would pay benefits based on what was paid-in using the artificial salary, rather than Mr. Hepler's actual pre-disability earnings of $3,074.83 per month (RP 59, Ex. 4).

His monthly disability allowance starting April 20, 1981, (RP 69) was defined in the Plan to be not less than 75% of earnings offset by the family worker's compensation received of $886.88 (RP 61), an amount above the artificial salary. He requested a copy of the home office Plan provisions concerning the benefits (RP 70) which his employer refused to furnish allegedly due to it being too large, over 300 pages, and that he wouldn't understand it anyway, since it was allegedly filled with legal jargon and technical legal terms (RP 71) which was not the case when some 544 days later the 27-page Plan text was provided in litigation (RP 73, Ex. 7).

Upon request for reconsideration of the $866.67 artificial benefit salary and after complaining to the U.S. Department of Labor, Mr. Hepler was informed by letter dated November 20, 1981, (Ex. 10, RP 81) that since the effective date of the Plan on January 1, 1978, it had been a practice of the employer to use the artificial salary of $10,400 per year for

first year of employment Plan payroll deductions, and that his benefit payments would likewise be based on artificial earnings. By this time Mr. Hepler had received only 2 benefit payments totaling the sum of $1,518.93 through September 1981, and benefit payments were suspended (RP 83).

Mr. Hepler filed suit against his employer claiming fraud, violation of Consumer Protection and alternatively, breach of fiduciary and contract duties. He also asserted that the laws of the state where the breach occurred, New York or Pennsylvania pursuant to the employment agreement, governed this case and he was entitled to punitive damages in connection with the fraud claim, or treble damages without local statutory limitation. CBS answered, generally denying a consumer protection violation and contending Plan deductions were computed using an artificial annual salary of $10,400 in order to present a workable Plan to the first year commissioned salesman and denying any liability for the resulting reduction in benefits.

As to the measure of damages being the difference between what would have been paid in benefits by the Plan had the employer made the proper payroll deductions and what was in fact received, the employer made no objection (RP 218) and offered no contradicting evidence at trial of actual damages and pre-judgment interest in the amount of $39,229.63, and additional treble damages. The trial concluded with the employer's objection to the applicability of certain federal ERISA law issues (RP 220).

Prior to trial, Mr. Hepler's demand for an advisory jury was denied (RP 12 and 16). At the conclusion of opening statements of counsel, Mr. Hepler's motion for a directed verdict on liability was denied (RP 34). The court reserved

judgment on application of law with respect to additional damages, punitive or treble, and concluded upon completion of trial that Washington law applied so as to disallow punitive damages, but that treble damages would be allowed to the total statutory limit under RCW 19.86.090, and any amendments thereto (CP 87). On August 10, 1983, the court awarded only the amount of $1,000 as treble damages, over Mr. Hepler's claim for $10,000 as treble damages, pursuant to legislative expansion of the civil remedy effective on July 24, 1983.

The Court of Appeals concluded, without discussion, that the state laws were pre-empted by federal law and that the claim for application "choice of law" was not well taken. Mr. Hepler seeks review of all issues resolved by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

In **Metropolitan Life Ins. Co. v. Massachusetts,** 471 U.S. , 85 L.ed.2d 728, 105 S.Ct. (June 3, 1985), this Court held that a state statute requiring certain minimum benefits be provided in insurance policies is not to be pre-empted by ERISA (29 U.S.C. § 1001 **et. seq.**)

The law of general application involved herein requiring modifications of insurance obligations and transactions to be in writing and part of the policy or plan should be similarly saved from pre-emption of federal law.

The issue of federal substantive law under ERISA shielding

the defendant from liability under basic state law of general application governing written modifications of insurance is one that involves both important questions of federal law which have not been, but should be, settled by this Court, and has decided the federal pre-emption question in a way in conflict with applicable decisions of this Court.

Within the past decade our society has witnessed a massive shift from individual insurance responsibility to large national insurance through tax exempt employee welfare Plans covering every insurance need, including medical Plans, dental Plans, life and accident Plans, disability Plans, legal services Plans and retirement Plans. Virtually every citizen has come to rely upon the security and integrity of such insurance Plans, particularly the poor and disadvantaged who are more likely to rely solely upon such inexpensive employment benefits. To them it is insurance, a shelter in a storm, a very important individual property right. By sponsoring such Plans employers act as agents for the individual employee participants and beneficiaries, particularly in offering such Plans as an additional form of compensation and in handling the necessary payroll deductions for the contributions.

Traditionally, our citizens have come to rely upon such insurance matters as exclusively a matter of important state interest, specifically delegated to the states as a matter of federal policy under 15 U.S.C. § 1012 and protected by the supremacy clause, U.S. Const. Art. 6 and Wa. Const. Art. 1, § 2, by reserved power to states, U.S. Const. Amend. 10, by full faith and credit, U.S. Const. Art. 4, § 1, by privileges and immunities, U.S. Const. Art. 4, § 2 and Wa. Const. art. 1, § 12, and by due process, U.S. Const. Amend. 14, § 1 and Wa. Const. Art. 1, § 3.

When parties contract for the rendition of services relating

to employment compensation and payroll deductions for related insurance programs, basic state rights and laws of general application apply. See gen. 44 C.J.S. § 225; RCW 48.01.020, .030, and .060; and Restatement (2d) of Agency, § 14 N, at 80 (1958).

It is illegal and a breach of fiduciary and contract duties in such a transaction to extraneously modify the insurance obligation, both under state law RCW 48.18.190 and federal law applicable to fiduciaries or administrators of employee welfare plans 29 U.S.C. §§ 1022(a)(1) and 1144(b)(2)(A), and (d), and trust law generally, see RCW 30.30.020. There is no conflict in applying such laws to this case.

Even in an action against an ERISA fund, trustee, plan, administrator or fiduciary a violation of the above laws of general application would be found to apply. ERISA expressly authorizes cooperative arrangements with state agencies as well as other federal agencies, and provides that state laws regulating banking, insurance or securities remain unimpaired. For legislative history and purpose of ERISA: see 1974 U.S. Code Cong. and Adm. News, p. 4639; p. 4655 as to above; p. 4643 as to minimum standards of fiduciary disclosure similar to existing trust principles codified in Washington; p. 4646 as to effectiveness of communication of plan contents to employees to avoid unfairness, incomprehensions, complexities or misleadings and hardships; p. 4648 as to providing specific written information; and p. 4651 as to principles of fiduciary conduct for the sole purpose of the beneficiary and in accordance with plan documents adopted from existing trust law.

However, this is not an action against an ERISA fund, trustee, plan, administrator or fiduciary. Mr. Hepler has a judgment against his employer for damages caused by wrongfully deducting payroll (RP 218) contributions, in Pennsylvania, the "home" state, per an employment contract, and for violation of state law. No question of incompatibility arises. The provisions of the Plan involved herein are relevant only to the issue of measuring damages, which was a relatively uncontested issue. There was never an issue as to Mr. Hepler's eligibility for benefits during the period from April 20, 1981 to April 20, 1983. See Resp. Reply Brief, at pp. 2.

The defendant admits that it is not an ERISA Plan fiduciary or administrator. See Appel. Reply Brief, at pp. 1. Yet, in attempting to overcome the burden of proof placed upon it for fiduciary fraud (see Resp. Brief, at pp. 12 and Resp. Reply Brief at pp. 3) defendant assumes ERISA administrator "standing" as a shield, contending that the "arbitrary and capricious" standard applied to discretionary administrative decisions of eligibility interpretations protects it from what would otherwise be a violation of the law. Employers do not have standing under ERISA to raise this issue absent a legislative grant. See 67 ALR Fed 947; **Pressroom Unions-Printers League Income Secr. Fund v. Continental Assur. Co.,** 700 F.2d 889 (2d Cir. 1983); **State ex rel Montgomery Ward v. Peters,** 636 S.W.2d 99 (Mo.App. 1982).

Theories or issues not presented to the trial court may not be raised for the first time on appeal; **Evans v. Cont. Cas. Co.,** 40 Wn.2d 614, 245 P.2d 470 (1952); **City of Bellevue v. King Co. Bound. Rvw. Bd.,** 90 Wn.2d 856, 586 P.2d 470 (1978); Particularly, where the failure or refusal to raise

the issue below was conscious and intentional. **Maynard Inv. Co., Inc. v. McCann,** 77 Wn.2d 616, 622, 465 P.2d 657 (1970). The employer failed to challenge the trial court's Finding of Fact XIX (CP 86) as to jurisdiction over the state claims and the parties, and the same should therefore be an established fact in the case. See **Goodman v. Bethel Sch. Dist. 403,** 84 Wn.2d 120, 524 P.2d 918 (1974).

In raising the preemption issue for the first time on appeal the employer violated Mr. Hepler's rights of due process, effectively preventing him from fully litigating the new claims, issues and remedies available in an action against an ERISA administrator, primarily a matter of exclusive federal jurisdiction.

The legal authorities cited by the employer on the preemption issue all involve federal actions against ERISA funds, trustees, plans, administrators or fiduciaries for conduct involving eligibility interpretations, and are not on point with this case. A state law fraud claim for damages equal to the benefits the claimant would have received had he properly participated in an ERISA plan (but for his employer's unfair and deceptive payroll deductions) does not seek a "benefit under a plan" and therefore could not be awarded in an ERISA action. **Freeman v. Jacques Orthopaedic & Joint Inplant Medical Group, Inc.,** 721 F.2d 654 (9th Cir. 1983); **Shaver v. N.C. Monroe Const. Co.,** 306 S.E.2d 519 (NC App. 1983); **Cornell Mfg. Co., Inc. v. Mushlin,** 420 NYS 2d 231 (1979); **Smith v. Crowder Jr. Co.,** 421 A.2d 1107 (Pa. 1980).

Neither the Insurance Code nor the Consumer Protection Act are incompatible with federal law. In fact by recent legislative amendment effective on July 24, 1983 RCW 19.86.090 increased the civil penalty to $10,000 and RCW 19.86.920 included federal court decisions and federal trade commission orders as a guide in the Act complementing the body of federal law governing unfair, deceptive, and fraudulent acts or practices in order to protect the public. This covers insurance services and dealings in good faith in the inducement, see **Federal Trade Comm'n v. Colgate--Palmolive Co.,** 380 U.S. 374, 13 L.ed.2d 904, 85 S.Ct. 1035 (1965), and **Levy v. North American Insr.,** 90 Wn.2d 846, 586 P.2d 845 (1978), and post-sale non-disclosure, see **Salois v. Mutual of Omaha,** 90 Wn.2d 355, 581 P.2d 1349 (1978). Federal preemption here is unneeded. See **State v. Williams,** 94 Wn.2d 531, 617 P. 2d 1012 (1980). Existing state law is not pre-empted by federal law unless it conflicts with the express terms of the federal law or the application of the state law would frustrate the objectives of federal legislation. **Purser v. Rahm,** 104 Wn.2d 159, 701 P.2d (July, 1985).

The Consumer Protection Act is to be liberally construed so that its beneficial purposes may be served. RCW 19.86.920. Our Supreme Court has expressly held that the Act is not penal. **State v. Ralph Williams NW Chrysler Plymouth,** 82 Wn.2d 265, 278, 510 P.2d 233 (1973). Even civil penalties under the Federal Trade Commission Act have been held to be remedial. **U.S. v. St. Regis Paper Co.,** 355 F.2d 688 (2d Cir. 1966). Our Court has retroactively construed the Crime Victims' Compensation Act as a remedial

statute affording a remedy, or bettering or forwarding remedies already existing. **Haddenham v. State,** 87 Wn.2d 145, 550 P.2d 9 (1976). **Johnston v. Beneficial Management,** 85 Wn.2d 637, 538 P.2d 510 (1975) appears inapplicable here, since the amendments better or forward remedies already existing.

On the "Choice of Law" question the issue of a Washington Court ignoring the parties' choice of law is "in conflict with" other federal cases and the case of **McGill v. Hill,** 31 Wn.App. 542, 644 P.2d 680 (1982), and involves an important question of federal property law which has not been, but should be, settled by this Court. By the Court summarily denying Mr. Hepler a jury trial on the issue of recovery of punitive damages by right arising from the parties' selection of Pennsylvania law where the payroll deductions occurred and the parties' relationship was centered (Ex. 1 and Ex. 2), Mr. Hepler's rights of due process were violated. See **Lauritzen v. Larsen,** 345 U.S. 571, 97 L.ed 1254, 1271, 73 S.Ct. 921 (1953). Unquestionably, if the law of Pennsylvania applies, Mr. Helper would be entitled to trial on this issue. **Kammerer v. Western Gear Corp.,** 96 Wn.2d 416, 635 P.2d 708 (1981).

In its opinion the Court of Appeals summarily determined that the "choice of law" provision in the underlying employment agreement did not govern the employer's wrongful payroll deductions for the Plan. This holding is not defensible, and undermines the broad choice of law agreement between the parties which covered "all matters or issues collateral thereto". That Court has repeatedly held that contracts will be given their plain and ordinary meaning, and where there is more than one instrument (the contract Ex. 1, and deduction authorization Ex. 2), they will be read **in**

pari materiae. Levinson v. Linderman, 51 Wn.2d 855, 322 P.2d 863 (1958); **Cordell v. Regan,** 23 Wn.App. 739, 598 P.2d 416 (1979); **Speirs v. Jahnsen,** 143 Wash. 297, 255 Pac. 117 (1927). The resulting disability Plan transaction was a mere form of employee compensation, related to the employment relationship. See **State ex rel Londerholm v. Anderson,** 195 Kan. 649, 662, 408 P.2d 864, 874 (1965). Pursuant to Restatement (Second) of Conflicts of Laws, §§ 196, at 623, and 145 (1971), Pennsylvania would have the most significant contacts and be an effective choice of law.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Court of Appeals of the State of Washington.

Respectfully submitted,

/s/ DUANE E. SCHOFIELD

DUANE E. SCHOFIELD
N 206 Sullivan Rd.
Veradale, WA 99037
Counsel for Petitioner

APPENDIX "A"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BRIAN P. HEPLER,
Respondent,
v.
CBS, Inc., a Corporation,
Appellant.

No. 6053-III-5
Division Three
Panel Three
FILED February 26, 1985

MUNSON, J.--Columbia Broadcasting Systems, Inc., (CBS) appeals a judgment finding it liable for breach of contract in connection with its administration of an employee benefit plan established under the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 **et seq.**, and violation of the Washington Consumer Protection Act, RCW 19.86. CBS contends: (1) federal law preempts the application of the Washington Consumer Protection Act; and (2) CBS's actions in utilizing an artificial salary base in determining Brian B. Hepler's benefits were not arbitrary and capricious. Mr. Hepler has filed a cross appeal, claiming the trial court erred in refusing to apply Pennsylvania law allowing punitive damages for fraud, and in denying his demand for a jury trial on the issue of punitive damages. Alternatively, Mr. Hepler contends the trial court should have awarded him treble damages up to $10,000 pursuant to the 1983 amendment to RCW 19.86.090. We affirm in part and reverse in part.

In March 1980, W. B. Saunders Company, a subsidiary of CBS, placed an advertisement in a Spokane newspaper to hire a commissioned salesman. Mr. Hepler responded to the advertisement and was interviewed in Spokane by the regional sales manager for W. B. Saunders Company. At the end of the interview, Mr. Hepler was given a packet containing information on employee benefits. One brochure contained information about a long-term disability plan.

Mr. Hepler was subsequently hired by W. B. Saunders Company and later received an employment agreement which had already been executed by the company. He signed the agreement in Spokane and returned it to W. B. Saunders' office in Pennsylvania. The employment agreement specified Mr. Hepler was to be paid on a straight commission basis and would receive no additional salary. The agreement also provided: "This Agreement and all matters or issues collateral thereto shall be governed by the laws of the State of Pennsylvania applicable to contracts performed entirely therein."

After returning the signed copy of the employment agreement, Mr. Hepler received a disability insurance enrollment form and another copy of the long-term disability plan brochure. He voluntarily enrolled and contributed to the plan through authorized deductions from his biweekly paychecks. His paychecks were issued directly by CBS's corporate offices in New York.

The brochure indicated the plan was a "welfare plan" under ERISA and provided that 26 weeks after an employee becomes totally disabled, he is entitled to benefits for 24 months if he cannot perform the duties of his regular occupa-

tion. The brochure further provided the amount of benefits a participant received would be based upon his "basic monthly earnings."

> Your **basic monthly earnings** is your regular pay, excluding overtime, bonuses and any other additional forms of compensation, unless an adjustment had been made for the purpose of Company benefits.

The contribution to be paid by the employee was three-quarters of 1 percent of his basic weekly earnings.

The brochure also provided:

> **Other sources of disability income** include Social Security, either **Primary** (payable to you alone) or **Family** (payable to you and your eligible dependents), plus any salary payments made to you by the Company, or other payments made under law, as explained in more detail below.
>
> If Primary Social Security benefits are payable, the LTD Plan in **combination** with all other monthly income benefits will continue 60% of your basic monthly earnings, up to a maximum **combined** monthly benefit of $5,000 from all sources.
>
> If Family Social Security benefits are payable, your LTD Plan benefits may be adjusted so that combined income from all sources does not exceed 75% of your basic monthly earnings.
>
> In no case, however, will you ever receive less than $50 a month from the LTD Plan no matter how much you receive from all other sources. And once your LTD Plan benefit payments begin, any increase in Social Security will have no effect on the amount of your LTD Plan benefit. These additional

> Social Security benefits will simply add to your total income.
>
> In addition to Social Security, other sources of disability income include Workers' Compensation, state disability benefits, similar statutory benefits, salary payments you receive from CBS (other than vacation payments and payments provided under a retirement plan) and any other disability benefits paid for in whole or in part by any other employer.

The brochure contained no choice of law provision.

Mr. Hepler worked for W. B. Saunders Company for approximately 5 months and received a total of $15,374.15 in commissions. On October 17, 1980, he sustained a back injury and was hospitalized on October 20. Mr. Hepler subsequently filed a claim for disability benefits under the long-term disability plan. It was his understanding from reading the brochure that he would be entitled to benefits beginning on April 20, 1981.

Mr. Hepler also applied for Social Security and workers' compensation benefits. His Social Security claim was denied, but he later received monthly payments of $886.88 in connection with his workers' compensation claim. These payments were payable to Mr. Hepler and his family. The Washington State Department of Labor and Industries sent information concerning these benefits to CBS's office in New York, rather than Pennsylvania where the claim was being processed. As a result, the processing of Mr. Hepler's disability claim under the plan was delayed.

In July 1981, Mr. Hepler telephoned the home office in Pennsylvania about the delay and was advised everything was in order and he would be hearing from CBS in the near future. In early August, Mr. Hepler received a telephone call from the benefits coordinator for W. B. Saunders Company who advised him she had a check for him in the amount of $1,468.93, his benefits through July 1981. When Mr. Hepler indicated his benefits should be more, she advised him his benefits were being calculated on an artificial salary base of $800 a month. This was the first time he was aware his benefits would be determined on any basis other than a monthly average of his commissions.

Mr. Hepler filed suit against CBS, claiming breach of contract, violation of the Washington Consumer Protection Act, and fraud. He also asserted the laws of the State of Pennsylvania governed this case pursuant to the employment agreement, and he was entitled to punitive damages in connection with his fraud claim. CBS answered, contending its use of the artificial base salary was authorized under the terms of the plan, and its conduct did not constitute a consumer protection violation.

Prior to trial, Mr. Hepler filed a demand for an advisory jury. This request was denied by the trial court. The court reserved judgment whether Pennsylvania or Washington law applied to this case with respect to punitive damages.

At trial, Mr. Hepler testified he relied solely on the information contained in the plan brochure when he decided to enroll. Since he was paid straight commissions, and did not receive a regular salary, he knew of no other method of calculating his basic monthly earnings except by taking an

average of his total commissions for the 5 months he worked. Only later did he become aware the deductions for his contributions had consistently been $3 and had been based upon an artificial salary utilized by the plan administrators for first-year commission salesmen.

The director of personnel benefits for CBS testified the long-term disability plan is funded entirely through employee contributions except for administrative costs, which are paid by CBS. He further testified it is common practice in the industry to utilize an artificial salary base for first-year employees who have no regular or fixed monthly income. He also stated it would be impractical to attempt to determine what a commission salesman's contribution would be without utilizing an artificial salary base. Of the 18,000 CBS employees enrolled in the plan, approximately 3,000 have been given an artificial salary base for purposes of disability benefits.

The director of personnel benefits also testified the restrictive clause found in the brochure's definition of "basic monthly earnings" was intended to allow the plan administrators to set a fixed salary base for employees such as Mr. Hepler, who had no regular earnings. The director further testified the plan was established under ERISA and had been drawn up by CBS's legal department.

At the close of trial, the court in an oral opinion found the restrictive clause in the definition of basic monthly earnings necessarily indicated some kind of adjustment was to be made when an employee had no regular pay. The court rejected Mr. Hepler's interpretation of the contract provision and concluded no breach of contract had occurred. The

court further concluded the evidence failed to prove fraud or that CBS's conduct constituted a consumer protection violation.

In a revised opinion, the court reversed itself, finding its previous decision erroneous. The court concluded the language of the plan was ambiguous and Mr. Hepler's interpretation of basic monthly earnings was the more reasonable interpretation. The court also concluded CBS's use of an artificial salary base constituted a violation of its statutory obligations as an insurance company; therefore, its conduct involved a per se violation of the Consumer Protection Act. However, the court affirmed its previous decision denying Mr. Hepler's claim of fraud, and also concluded Pennsylvania law was inapplicable.

The court assessed damages as the difference between what Mr. Hepler expected his benefits to be and what he in fact received. Mr. Hepler was awarded costs, reasonable attorney fees, and treble damages in the amount of $1,000.

CBS initially contends the trial court erred in rejecting CBS's interpretation of "basic monthly earnings". Therefore, CBS should not have been found liable for breach of contract. For the first time on appeal, CBS asserts the supremacy clause preempts the application of state law to this case because the benefit plan was established under ERISA and state law is incompatible with federal law. We agree. **See Florida Lime & Avocado Growers, Inc. v. Paul,** 373 U.S. 132, 142-43, 10 L.ed.2d 248, 83 S.Ct. 1210 (1963); **Hines v. Davidowitz,** 312 U.S. 52, 67, 85 L.ed. 581, 61 S.Ct. 399 (1941); **Savage v. Jones,** 225 U.S. 501, 533, 56 L.ed. 1185, 32 S.Ct. 715 (1912).

In actions to enforce benefit rights under a welfare plan covered by ERISA, federal substantive law controls; state law principles may only be applied if compatible with federal policy. 29 U.S.C. § 1144(a). **See also Peckham v. Board of Trustees,** 653 F.2d 424, 426 (10th Cir. 1981); **Rehmar v. Smith,** 555 F.2d 1362 (9th Cir. 1976) (as amended on denial of rehearing January 3, 1977); **Provience v. Valley Clerks Trust Fund,** 509 F. Supp. 388 (E.D. Cal. 1981). According to the weight of federal authority, the actions of the trustee in administering an employee benefit plan must be sustained as a matter of law unless the plaintiff can prove the administrators' conduct was arbitrary and capricious. **Fine v. Semet,** 699 F.2d 1091, 1093 (11th Cir. 1983); **Bayles v. Central States, Southeast & Southwest Areas Pension Fund,** 602 F.2d 97, 99-100 (5th Cir. 1979); **Peckham v. Board of Trustees, supra** at 426; **Bueneman v. Central States, Southeast & Southwest Areas Pension Fund,** 572 F.2d 1208, 1209 (8th Cir. 1978).

Here, the trial court apparently relied upon the rules that ambiguities in a contract must be resolved against the drafter, and that legitimate expectations of the insured should be upheld absent clear language to the contrary under the contract. These rules are incompatible with the arbitrary and capricious standard. **See generally, Rehmar v. Smith, supra.** However, the court's decision on liability can be sustained on the basis CBS's failure to adequately disclose the use of an artificial salary base to Mr. Hepler was arbitrary and capricious, even though its interpretation of "basic monthly earnings" and its use of the artificial salary base would otherwise be supportable. **See Thomas v. French,** 99 Wn.2d 95, 659 P.2d 1097 (1983).

CBS has a fiduciary obligation to "specify the basis on which payments are made. . . from the plan." 29 U.S.C. § 1102(b)(4).[1] CBS offered no reason why this procedure for calculating benefits was not fully disclosed to Mr. Hepler. This lack of disclosure must be perceived as arbitrary and capricious in light of the fiduciary relationship which existed between the parties. Therefore, the trial court did not err in holding CBS liable under the contract.

CBS next contends the trial court erred in determining its use of the artificial salary base constituted a per se violation of the Consumer Protection Act, RCW 19.86, since federal law preempts the application of the insurance code and the Consumer Protection Act. CBS also asserts it is not in the business of insurance; therefore, the insurance code is inapplicable regardless of federal preemption.

29 U.S.C. § 1144(b)(2)(B) of the Employment Retirement Income Security Act of 1974 states:

> (B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business

[1]The plan brochure also indicates the existence of a fiduciary relationship:

What You Have a Right to Expect

. . .

You have a right to expect fiduciaries--that is, the people who are responsible for the management of the LTD Plan--to act prudently and in your best interests.

> of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

Since the plan was organized under ERISA, Mr. Hepler's cause of action against CBS for violations of the Washington insurance code and Consumer Protection Act are preempted. **Provience v. Valley Clerks Trust Fund, supra** at 392.[2]

Finally, CBS contends the trial court erred in denying its motion to amend its pleadings to conform with the proof that Mr. Hepler's benefits should be payable at the rate of 60 percent of his basic monthly earnings, rather than 75 percent of those earnings as CBS admitted in its answer. CBS's attorney stated during trial there was no dispute the workers' compensation benefits Mr. Hepler received were payable to him and to the members of his family. The plan clearly indicates benefits are payable up to 75 percent of the injured party's basic monthly earnings when combined with other

[2]Even assuming state law was not preempted, it is questionable whether CBS's conduct in administering the plan would be governed by RCW 48, the Washington insurance code. **See generally State ex rel. Fishback v. Universal Serv. Agency,** 87 Wash. 413, 151 P. 768 (1915). RCW 48.01.050 provides: " 'Insurer' as used in this code includes every person engaged in the business of making contracts of insurance, other than a fraternal society." Given the fact the long-term disability plan is an in-house program for the sole benefit of CBS employees, CBS cannot reasonably be perceived as being in the insurance business within the meaning of RCW 48.01.050. Therefore, the provisions of the insurance code are inapplicable. The trial court incorrectly determined a per se violation of the Consumer Protection Act had occurred in terms of any violation of the insurance code.

benefits payable both to the claimant and his family. The 60 percent rule applies only when other income is payable solely to the injured party. Since the trial court correctly applied the 75 percent rule to this case, any error pertaining to the court's refusal to allow CBS to amend its pleadings is harmless.

In support of his cross appeal, Mr. Hepler contends the trial court erred in refusing to apply Pennsylvania law with respect to his claim for punitive damages on the basis of fraud.

As previously noted, in actions to enforce benefit rights under a plan covered by ERISA, federal substantive law controls. 29 U.S.C. § 1144(a). However, where state law is compatible with federal policy, state law principles may be applied. In **Provience v. Valley Clerks Trust Fund, supra** at 391, the Federal District Court concluded a claim of fraud against the administrators of an ERISA plan is not preempted by federal law:

> [I]t now seems settled that where the state law has only an indirect effect on the plan **and** where it is one of general application which pertains to an area of important state concern, the court should find there has been no preemption.

(Footnote omitted.) Hence, the applicability of Pennsylvania state law in terms of Mr. Hepler's claim for punitive damages for fraud is not preempted.

However, Mr. Hepler's assertion the choice of law provision in the employment contract should govern this case is not well taken. As the trial court correctly stated, the employment contract and the long-term disability plan are

two separate agreements, involving two entirely different matters. The choice of law provision in the employment contract cannot reasonably be construed as applying to the present dispute over long-term disability benefits.

Likewise, under conflicts of law analysis, Washington has the greatest interest in having its law apply to this case since it has the most significant contacts. **See Barr v. Interbay Citizens Bank,** 96 Wn.2d 692, 697-98, 649 P.2d 827 (1981); **Werner v. Werner,** 84 Wn.2d 360, 368, 526 P.2d 370 (1974); **Potlatch Fed. Credit Union v. Kennedy,** 76 Wn.2d 806, 809, 459 P.2d 32 (1969). Mr. Hepler is a resident of this state, the payroll deduction form was completed in this state, all representations concerning the plan were made in this state, and any injury to Mr. Hepler in terms of the administration of the plan occurred in this state.

Because we have concluded Washington law was applicable, we need not address Mr. Hepler's further claim of a right to a jury trial in terms of punitive damages under Pennsylvania law. Similarly, because we have concluded the Consumer Protection Act is inapplicable, we do not address Mr. Hepler's final contention that the 1983 amendment to the Consumer Protection Act (treble damages up to $10,000) should apply to this case.

The decision concerning liability and damages for breach of contract is affirmed. The award of treble damages under the Consumer Protection Act is reversed. The award of costs and attorney fees at trial is affirmed on the basis of 29 U.S.C. § 1132(g). As the substantially prevailing party on appeal, Mr. Hepler is awarded $4,700 in attorney fees pursuant to RAP 18.1; costs will be determined after the filing of a cost bill.[3]

/s/ MUNSON, J.

WE CONCUR:

/s/ McINTURFF, A.C.J.

/s/ THOMPSON, J.

[3]In his affidavit for attorney fees, Mr. Hepler has included items purportedly related to this appeal which include, but are not limited to: redraft findings, conclusions and judgment; office conference re: reconsideration motions; research right to trial by jury--instructions; draft praecipe and writ of execution to enforce judgment; receive and review court's memo opinion; review plaintiff's reconsideration/new trial. For the above, he attributes 5.9 hours to the appeal and 21.9 hours to the cross appeal at $80 per hour. These are not appellate costs. They are disallowed.

APPENDIX "B"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BRIAN P. HEPLER, Respondent, v. CBS, Inc., a Corporation, Appellant.	No. 6053-III-5 Division Three Panel Three ORDER AMENDING OPINION

The opinion filed in the above matter on February 26, 1985, is amended as follows.

On page 1, line 1, "Columbia Broadcasting Systems, Inc.," is amended to read "Columbia Broadcasting System, Inc."

On page 1, line 4, "Employment Retirement Income Security Act of 1974" is amended to read "Employee Retirement Income Security Act of 1974".

DATED April 8, 1985.

BY THE COURT:

/s/ DALE M. GREEN

Chief Judge

APPENDIX "C"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BRIAN P. HEPLER, Respondent, v. CBS, Inc., a Corporation, Appellant.	No. 6053-III-5 Panel Three Order Denying Motions For Reconsideration

The Court has considered the Motion for Reconsideration of Appellant CBS, INC., and the Motion for Reconsideration of Respondent Brian P. Hepler and those motions are denied.

DATED: March 26, 1985.

BY THE COURT:

/s/ DALE M. GREEN

CHIEF JUDGE

APPENDIX "D"

THE SUPREME COURT OF WASHINGTON

ORDER ON JUNE 7, 1985, PETITION FOR REVIEW CALENDAR — 25700-X-77

The Court having considered the following Petitions for Review on its June 7, 1985, Petition for Review Calendar; Now, therefore, it is hereby

ORDERED:

A. The following Petitions for Review are denied:

Division I

Eugene Sykora v. Western International Hotels d/b/a The Olympic Hotel
Court of Appeals No. 11295-3-I
Supreme Court No. 51589-1

In the Matter of the Marriage of Donna C. Wightman and Gary O. Wightman
Court of Appeals No. 11808-1-I
Supreme Court No. 51591-3

Albert M. Mark v. Gerry R. Gibson and Jane Doe Gibson, his wife
Court of Appeals No. 12308-4-I
Supreme Court No. 51609-0

In the Matter of the Marriage of Judy D. Hales and Thomas F. Hales, Jr.
Court of Appeals No. 11668-1-I
Supreme Court No. 51611-1

Denied Petitions Continued

James Shelton d/b/a University Music Center v. State of Washington; King County Superior Court, et al.
Court of Appeals No. 14191-1-I
Supreme Court No. 51613-8

State v. Felton Johnson, Jr.
Court of Appeals No. 14332-8-I
Supreme Court No. 51656-1

State v. Albert M. Mark
Court of Appeals No. 13727-1-I
Supreme Court No. 51663-4

Division II

Ronald Moss v. Thurston County
Court of Appeals No. 7697-7-II
Supreme Court No. 51644-8

State v. Kolose Omeli
Court of Appeals No. 6921-1-II
Supreme Court No. 51651-1

Division III
State v. Steven Douglas Kinard
Court of Appeals No. 6290-2-III
Supreme Court No. 51615-4

Ralph W. Hunter and Nancy J. Hunter v. Holy Family Hospital; Dr. Gerd Fischer, et ux., et al.
Court of Appeals No. 5270-2-III
Supreme Court No. 51624-3

Brian P. Hepler v. C.B.S., Inc., a Corporation
Court of Appeals No. 6053-5-III
Supreme Court No. 51627-8

Denied Petitions Continued

State v. Charles Emerson Brown, Jr.
Court of Appeals No. 6135-3-III
Supreme Court No. 51628-6

Wayne C. Smith v. Sturm, Ruger & Company, Inc., a Delaware Corporation
Court of Appeals No. 5517-5-III
Supreme Court No. 51630-8

Ludig Construction, Inc., a Washington Corporation v. Rainier National Bank, a Federally Chartered Bank
Court of Appeals No. 6196-5-III
Supreme Court No. 51634-1

State v. Leland Earl Goodsell
Court of Appeals No. 6137-0-III
Supreme Court No. 51635-9

State v. Pasqual Briones
Court of Appeals No. 5895-6-III
Supreme Court No. 51652-9

In the Matter of the Marriage of Laura L. Destito and John S. Destito
Court of Appeals No. 5999-5-III
Supreme Court No. 51660-0

In the Matter of the Estate of Earl Sherry, Deceased; Kathleen McKinnon, et al. v. Frances Sherry, et al.
Court of Appeals No. 6122-1-III
Supreme Court No. 51661-8

Norman and Ursula Kagele v. Aetna Life and Casualty Company, et al.
Court of Appeals No. 5826-3-III
Supreme Court No. 51662-6

B. The following Petitions for Review are continued to the June 20, 1985, En Banc Administrative Conference:

Division I

In the Matter of the Marriage of David R. Golob and Mary K. Golob
Court of Appeals No. 12175-8-I
Supreme Court No. 51638-3

State v. Dwight A. Hall
Court of Appeals No. 12980-5-I
Supreme Court No. 51648-1

C. Pursuant to RCW 48.32.160, the respective petitions of the parties are stayed for a period of 180 days. The petitions will be rescheduled on the first available Departmental Calendar after November 12, 1985.

Division I

Harriet M. Gould v. Donald T. Reay
Court of Appeals No. 13976-2-I
Supreme Court No. 51590-5

D. The Petition for Review is denied and request for attorney fees is denied:

Division I

L. E. Paradis v. Mary F. Koehler and John Doe Koehler
Court of Appeals No. 12447-1-I
Supreme Court No. 51637-5

DATED at Olympia, Washington, this 7th day of June, 1985.

/s/ JAMES M. DOLLIVER
CHIEF JUSTICE

APPENDIX "E"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BRIAN P. HEPLER,	)	MANDATE
Respondent,	)	No. 6053-III-5
v.	)	Spokane County No. 82-2-03706-5
CBS, Inc., a Corporation,	)	
Appellant.	)	Petition for Review denied by Supreme Court on June 7, 1985.

The State of Washington to: The Superior Court of the State of Washington in and for Spokane County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division III, filed on February 26, 1985, became the decision terminating review of this court in the above entitled case on June 7, 1985. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Pursuant to the Opinion, Mr. Hepler is awarded $4,700.00 in attorney's fees. Costs on appeal in the amount of $585.49 in favor of respondent and against appellant.

cc: C. Bruce Diluzio
Eric Richter
Duane Schofield
Reporter of Decisions

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 14th day of June, 1985.

/s/ PAUL J. WASSON

Clerk of the Court of Appeals, State of Washington Division III